



STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH C. GLEICHER
JUDGE

March 29, 2011

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Mr. Corbin R. Davis
Chief Clerk
Michigan Supreme Court
P.O. Box 30048
Lansing, MI 48909

Re: ADM File No. 2010-05
Proposed Amendments to MCR 2.112, 7.206 and 7.213

Dear Mr. Davis:

As chair of the Court of Appeals Rules Committee, I write on behalf of the Judges of the Court of Appeals in response to the proposed rule amendments pertaining to original actions to enforce the Headlee amendment pursuant to Const 1963, art 9, § 32. Following are statements of this Court's position on the proposed rule amendments.

**I. Proposed Amendments to MCR 2.112(M) and MCR 7.206(D)(1)(a) & (2)(a) –
Eliminating Fact-Specific Pleadings.**

The Court strongly urges that the proposed amendments to eliminate fact-specific pleadings in favor of notice pleadings be rejected. MCR 2.112(M) and MCR 7.206(D) were amended effective January 1, 2008, at this Court's request, to specifically require that a complaint or answer in a Headlee action state with particularity the factual basis for an alleged violation or defense. The specific pleading requirements were purposefully designed to speed this Court's deliberation of Headlee actions by providing the three-judge panels with as much detail about each case as possible in the initial pleadings. Allowing the parties to postpone specific pleading until later in the proceedings encourages delay and imposes unnecessary road blocks to the speedy disposition of these actions, contradicting the purpose of the proposed amendments to MCR 7.206(E) and MCR 7.213(C) in classifying the cases as priorities. The Legislative Commission on Statutory Mandates (LCSM) suggests in its letter dated February 3, 2011 in support of the court rule amendments that the fact-specific pleading requirements only perpetuate the perception that Headlee actions are more difficult to initiate than other civil claims. But, as Justice Robert P. Young stated in his concurrence to the 2007 amendment to MCR 2.112(M),

None of the tools available to our circuit courts for processing trials are available to the Court of Appeals. Thus, the Court of Appeals is poorly suited and equipped for factual development of new claims.... [T]he Court of Appeals is ill-equipped to evaluate the claims and defenses in a complex and fact-intensive original action without the assistance of the parties in developing the factual bases for their claims and defenses.

Contrary to the LCSM's position, the lack of specificity in the pleadings cannot be "addressed efficiently through discovery" in the Court of Appeals.

II. Proposed Amendments to MCR 7.206(E) – Elimination of Supporting Briefs and Preliminary Hearing.

These amendments would create a new subsection of the court rule with different pleading requirements for Headlee actions than those applicable to other original actions. The amendments change the procedure for handling Headlee actions under the existing court rules in two important respects. First, the amendments eliminate the requirement under existing MCR 7.206(D)(1)(b) and (2)(b) of filing a brief in support of the complaint or answer. Second, the amendments eliminate the preliminary hearing under existing MCR 7.206(D)(3), thus restricting the Court's ability to grant relief at the preliminary hearing stage. The Court of Appeals objects to both changes.

The filing of supporting briefs with the complaint and answer assists the Court with its initial determination whether the action requires factual development (necessitating the appointment of a special master or referral to a circuit court or the tax tribunal) or whether it involves only questions of law (permitting the action to immediately proceed to a decision on the merits). Having more information rather than less at the initial stage of the lawsuit enables this Court to appropriately handle Headlee actions and ensures that the parties "receive a full, fair, and accurate judicial assessment of the issues presented in their claims and defenses." (Justice Robert P. Young, concurrence to the 2007 amendments to MCR 2.112.)

Next, restricting the Court's ability to grant relief at the preliminary hearing stage serves to prolong those actions that clearly deserve peremptory relief or no relief. Neither the parties nor the Court benefit from this proposed restriction. When properly exercised, granting relief at the preliminary hearing reduces the time and expense of prosecuting, defending, and deciding Headlee actions.

III. Proposed amendment to MCR 7.206(E)(3)(b) – Appointment of a Special Master.

The Court of Appeals takes no position on the proposed amendment to MCR 7.206(E)(3)(b), which allows for referral of Headlee actions to a special master "for purposes of pretrial proceedings, conducting a trial to receive evidence and arguments of law, and issue a written report for the court setting forth finding of fact and conclusion [sic: conclusions] of law." The Court has utilized the services of a special master in the past, although there is some question whether the Court had the constitutional authority to *appoint* the special master. See Const 1963, art VI, §§ 23, 27. If the special master amendment is adopted, the Court would seek

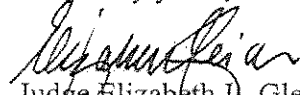
clarification concerning who selects the special master, how the special master is to be paid, whether the special master's findings of fact are advisory only, and how challenges to the special master's findings of fact and conclusions of law are to be resolved.

IV. Proposed amendments to MCR 7.206(E)(3)(d) and MCR 7.213(C)(6) – Classifying Headlee Actions as Priority Cases

The Court of Appeals has no objection to the proposed court rule amendment to MCR 7.213(C)(6), which adds Headlee actions to the list of cases receiving priority treatment on the calendar call. This amendment simply codifies what the Court already does in practice. However, the last sentence of proposed MCR 7.206(E)(3)(d) goes beyond simply classifying Headlee actions as one of several types of priority cases. That amendment states that “[t]he proceedings [in Headlee actions] shall take precedence over other nonemergency matters pending before the court.” The priority cases listed under MCR 7.213(C) are not considered emergency matters except when this Court has directed or the Supreme Court has ordered that the case be treated as an emergency. Hence, the two amendments are somewhat inconsistent. The Court recommends deleting the last sentence of proposed MCR 7.206(E)(3)(d) so it is clear that Headlee actions receive the same level of, but not higher, priority as the other case types listed in MCR 7.213(C).

Thank you for considering our comments on these proposals.

Very truly yours,



Judge Elizabeth L. Gleicher

Chair, Court of Appeal Rules Committee

cc: Chief Judge William B. Murphy
Court of Appeals Judges
Larry Royster, Rules Committee member
Douglas Messing, Rules Committee member